Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

VERANDA BEACH, LLC,

Petitioner,

v.

RLI INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The owner of a construction project sued the surety in federal court under a standard-form performance bond published by the American Institute of Architects ("AIA"), widely used in the construction industry, and containing a judicial dispute resolution provision:

> 9. Any proceeding, legal or equitable, under this Bond may be instituted in any *court* of competent jurisdiction in the location in which the work or part of the work is located. . . .

The lower courts compelled arbitration of the bond claims under § 2 of the Federal Arbitration Act, using the doctrines of equitable estoppel and incorporation by reference to override the judicial dispute resolution provision, based on an arbitration provision in the underlying AIA standard-form construction contract between the owner and the contractor.

QUESTIONS

1. Whether § 2 of the Federal Arbitration Act prohibits the federal courts from overriding a judicial dispute resolution provision in a standard-form contract in order to compel arbitration under doctrines like equitable estoppel and incorporation by reference?

2. Whether the Court should resolve the conflict between the Fifth Circuit and the Eighth Circuit over the application of § 2 of the Federal Arbitration Act to conflicting judicial dispute resolution and arbitration provisions in standard-form documents?

PARTIES

Petitioner Veranda Beach, LLC ("Veranda") is a Mississippi limited liability company that owned and developed the Magnolia Shores Condominium in Biloxi, Mississippi.

Respondent RLI Insurance Co. ("RLI") is an Illinois insurance company that sold the AIA performance bond to guarantee to Veranda the performance of the AIA construction contract.

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Petitioner Veranda Beach, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Fifth Circuit entered in this matter on December 9, 2004.

OPINIONS BELOW

The opinion of the Fifth Circuit that affirmed the district court is reprinted herein as Appendix 1. The district court's order granting the motion to compel arbitration under the doctrines of equitable estoppel and incorporation by reference is reprinted herein as Appendix 2.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the Fifth Circuit was entered December 9, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. V

> No person shall be . . . deprived of . . . property, without due process of law. . . .

U.S. CONST., AMEND. VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

§ 2, Federal Arbitration Act, 9 U.S.C. § 2

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case raises the question of how far federal courts should go to compel arbitration under § 2 of the Federal Arbitration Act. Apparently in furtherance of a policy to send construction cases to arbitration, the lower courts interpreted the dispute resolution provisions in two AIA construction documents in such a way as to compel arbitration between parties whose standard-form contract contained a provision for judicial resolution of disputes.

The agreement between Petitioner Veranda Beach, LLC and Respondent RLI Insurance Co. is the AIA Performance Bond (AIA Document A312), sold by RLI with Veranda as the obligee. The AIA312 Performance Bond contains the following judicial dispute resolution provision:

> 9. Any proceeding, legal or equitable, under this Bond may be instituted in any **court** of competent jurisdiction in the location in which the work or

> part of the work is located and shall be instituted within two years after the Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. . . .

(Emphasis added.)

The Performance Bond guarantees performance of the Construction Contract, which is also an AIA standard-form contract (AIA Document A101-1997and AIA Document A201-1997). It contains an arbitration provision for claims between the owner (Veranda) and the contractor (United Contractors), a prohibition against construing the contract to create contractual relationships between parties other than the owner and the contractor, and a limitation on arbitration:

> 1.12 The Contract. . . . The Contract Documents shall not be construed to create a contractual relationship of any kind. . . (3) between any persons or entities other than the Owner and Contractor.
>
> 4.6 Arbitration
>
> . . .
>
> 4.6.2 Claims not resolved by mediation shall be decided by arbitration . . . in accordance withe the Rules of the American Arbitration Association currently in effect. . . .

> 4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner ... parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration.

The two AIA construction documents set up the following regime for dispute resolution:

Contract	Parties	Forum
Construction Contract	Owner/Contractor Joinder Parties	Arbitration
Performance Bond	Owner/Surety	Court

Veranda sued RLI in the Southern District of Mississippi under diversity jurisdiction, seeking damages and other relief under the Performance Bond for construction delays, defects, and deficiencies arising out of the construction of a condominium project in Biloxi, Mississippi. There was no arbitration between the contractor and Veranda to activate the joinder provision in the construction contract. RLI moved to compel arbitration, claiming that a certain *Memorandum of Understanding* contained an arbitration agreement. The district court recognized problems in the formation and interpretation of the alleged arbitration provision in the *Memorandum of Understanding* and implicitly rejected it as a basis for arbitration. The district court acknowledged that the Performance Bond did not contain an arbitration

agreement but instead contained a judicial dispute resolution provision:

> The performance bond does not contain an arbitration provision, but does provide that any lawsuit against RLI be brought in a court of competent jurisdiction where the work is located.

(App. 2, pp.1-2) The district court applied two theories *sua sponte* to compel arbitration: (1) equitable estoppel required Veranda to arbitrate claims against RLI pursuant to the arbitration provision in the Construction Contract; and (2) the Performance Bond incorporated by reference the arbitration provision in the Construction Contract:

> A non-signatory to a contract containing an arbitration provision may compel arbitration against the signatory of that contract only if one of these conditions is met: (1) the signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract"; or (2) the signatory "must rely on the terms of the written agreement in asserting claims against the non-signatory." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), *reh'g en banc denied* 218 F.3d 745 & *cert. denied*, 531 U.S. 1013. The Court finds that the dispute regarding liability for the alleged default in the construction contract is precisely why the performance bond was procured. Accordingly, the Court further finds that RLI can move to enforce the arbitration clause even though RLI did not sign the construction contract.

> Furthermore, when a performance bond incorporates the provisions of a contract, the arbitration provisions of the contract are made part of the bond and are applicable to disputes involving the surety. *J.S.&H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 216 (5th Cir. 1973). Although neither party provides reference to this well-settled rule, the Court has found that the performance bond specifically incorporates the construction contract as shown by the following:
>
> > The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for performance of the Construction Contract, which is incorporated herein by reference.
>
> This provision renders Veranda Beach's claims subject to the arbitration clause. . . .

(App. 2, pp. 5-6)

The district court gave no effect to the judicial dispute resolution provision in the Performance Bond and offered no explanation why equitable estoppel and incorporation by reference overrode the judicial dispute resolution provision or why the arbitration provision in the Construction Contract was construed to create an arbitration agreement between Veranda and RLI.

In accordance with the order to compel arbitration, Veranda filed an arbitration proceeding. After the arbitration, RLI moved to confirm the arbitration award and Veranda moved to vacate the arbitration award. The district court affirmed the arbitration award. Veranda appealed the order to compel arbitration and the arbitration award.

After oral argument, the Fifth Circuit affirmed without opinion. (App. 1)

REASONS FOR GRANTING THE PETITION

1. *Arbitration Guidelines for Lower Courts*

This case presents an opportunity to establish rules and guidelines for compelling arbitration – an important need because of the growing number of motions to compel arbitration in commercial and consumer disputes and the expanding trend to employ various doctrines to compel arbitration between parties that have not agreed to arbitrate the claims in the case.

(a) Absence of Agreement to Arbitrate

In the case *sub judice*, the lower courts crossed the line in pursuit of a proarbitration policy to send construction disputes to arbitration. Here, the parties agreed to resolve disputes in court, yet the lower courts employed the doctrines of equitable estoppel and incorporation by reference to compel arbitration – without explanation, justification, or authority to override the agreement between the parties to resolve disputes in court.

Section 2 of the FAA provides that "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has consistently stated that there must be a written agreement to arbitrate between the parties. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court cautioned against compelling arbitration in pursuit of a proarbitration policy contrary to the plain text of the contract between the parties:

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." Here there is no ambiguity. No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty. Accordingly, the proarbitration policy goals of the FAA do not require the agency to

> relinquish its statutory authority if it has not agreed to do so.

Id. at 293-94 (citations omitted). *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (*quoting Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute"); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-89 (1989) ("FAA does not require parties to arbitrate when they have not agreed to do so. . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. . . . Arbitration under the Act is a matter of consent, not coercion. . . ."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (FAA's centerpiece provision is written agreement to arbitrate); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

The order to compel arbitration violated the Court's rules that the agreement of the parties must be honored, that § 2 of the FAA requires an agreement to arbitrate between the parties, and that a proarbitration policy cannot be applied to compel arbitration where the parties have not agreed to

arbitration. The lower courts simply overrode the express agreement between Veranda and RLI to resolve disputes in court and in the process eliminated the judicial dispute resolution provision from the Performance Bond and re-wrote the regime for dispute resolution set up in the two AIA documents.

(b) Overzealous Proarbitration Policy

The lower courts offered no reason, explanation, justification, or authority to override the judicial dispute resolution provision in the AIA312 Performance Bond. The only plausible explanation is that the lower courts were pursuing a proarbitration policy to refer construction cases and other commercial disputes to arbitration whenever possible. This is the wrong policy. The Court should enforce and confirm the rule that the proarbitration policy applies only when the parties have agreed to arbitrate – not to whether the parties have agreed to arbitrate.

(c) Re-Writing the AIA Documents and Dispute Resolution Regime

Most important, the holding potentially replaces the judicial dispute resolution provision in all A312 performance bonds with compulsory arbitration. There is no difference between the AIA312 Performance Bond and the AIA101-1997/AIA201-1997 Construction Contract in this case and the AIA312 performance bonds and AIA101-1997/AIA201-1997 construction contracts in every other case, so that the arbitration ruling in this case is applicable to all cases in which the AIA documents are used. For that matter, compulsory arbitration through equitable estoppel applies in every case, according to the ruling in this case, in which the

AIA312 performance bond guarantees performance of a construction contract with an arbitration provision. Thus, whenever the construction contract contains an arbitration provision for disputes between the owner and the contractor, equitable estoppel and/or incorporation by reference eliminate the judicial dispute resolution provision or other dispute resolution provision in the performance bond. The lower courts re-wrote the dispute resolution regime set up in the AIA documents by making claims under the AIA312 Performance Bond subject to arbitration and by eliminating the restrictions in the AIA101-1997 Construction Contract on creating contractual relationships between other parties and on the parties with the right to arbitration.

Because the arbitration ruling implicates standardized construction documents used nationwide, this Court should take this opportunity to instruct the lower courts to refrain from pursuing a proarbitration policy contrary to the provisions of the standard-form documents. Otherwise, the courts will be overriding the wishes of the parties and upsetting the industry's dispute resolution regimes.

(d) Policy Considerations

Equally important, as a matter of policy, why should RLI and other issuers and sellers of AIA312 performance bonds and other standard-form contracts with judicial dispute resolution provisions be allowed to compel arbitration of claims under their own standard-form contracts whenever they prefer arbitration to litigation – whether by employing the doctrine of equitable estoppel, incorporation by reference, or any other doctrine or theory? The arbitration ruling in this case signals to the issuers of standard-form contracts that they can seek compulsory arbitration even if their standard-

form contracts do not contain arbitration clauses and even if the standard-form contracts contain judicial dispute resolution provisions. The arbitration ruling opens the door for issuers and sellers of standard-form contracts to compel arbitration without providing for or even disclosing that the buyers and beneficiaries of the standard-form contracts are agreeing to arbitration and surrendering their rights to judicial resolution of claims and their rights to jury trials. It is dubious enough to allow issuers and sellers of standard-form contracts to compel arbitration where their standard-form contracts are silent as to resolution of disputes, providing neither for arbitration nor litigation; it is far more indefensible to allow the issuers and sellers to compel arbitration where their standard-form contracts provide expressly for judicial resolution of disputes.

(e) Constitutional Issue

Constitutionally, the arbitration ruling in this case is fundamentally unfair because it deprives Veranda of its Fifth Amendment right to due process of law in a court of law and its Seventh Amendment right to a jury trial – without notice that it is giving up these rights. In fact, the AIA312 Performance Bond informed Veranda that it had the right to institute "[a]ny proceeding, legal or equitable, under this Bond ... in a court of competent jurisdiction" where the construction project is located. In the face of the judicial dispute resolution provision, no reasonable or rational buyer or obligee of the AIA312 performance bond could possibly realize that he or she was giving up his or her constitutional right to seek redress in court before a jury and was instead agreeing to compulsory arbitration. Veranda relied on the judicial dispute resolution provision and should not lose its

constitutional rights under the doctrine of equitable estoppel, incorporation by reference, or any other undisclosed doctrine or theory.

(f) State-Law Contract Principles

Finally, the Court should take this opportunity to instruct the lower courts to adhere to state-law principles of contract interpretation in resolving motions to compel arbitration – and not ignore or misapply state law in pursuit of proarbitration policies. The Court has established the rule that under § 2 of the FAA, state law governs the interpretation of contracts. *See First Options*, 514 U.S. at 942 ("When deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary state-law principles that govern the formation of contracts.").

Here, the lower courts ignored Mississippi contract law and in the process contravened several of Mississippi's fundamental rules for contract interpretation. For example, Mississippi contract law requires courts: (1) to enforce contracts as written (i.e., enforce the judicial dispute resolution provision); (2) to give meaning and effect to all contract terms (i.e., give meaning and effect to the judicial dispute resolution provision); (3) to interpret ambiguous terms against the drafter (i.e., against RLI and arbitration); (4) to construe commercial surety bonds strictly against the surety (i.e., strictly against RLI and arbitration); (5) to prefer a special term over a general term (i.e., prefer the special judicial dispute resolution provision over the general incorporation by reference term); and (6) to prefer terms in the performance bond over terms incorporated by reference from the construction contract (i.e., an *Erie*-guess that Mississippi would adopt the rule that the judicial dispute

resolution provision in the performance bond controls over the arbitration provision in the incorporated construction contract).

Similarly, the lower courts ignored the basic rules and policies for equitable estoppel. For example, equitable estoppel has never been used to override an express judicial dispute resolution provision to compel arbitration. Traditionally, equitable estoppel is used to find a contract where none exists, to fill in a contractual gap, so to speak, not to eliminate an existing contractual provision. In the case relied on for equitable estoppel, *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), there was no contract between the parties, let alone a standard-form contract sold by the party seeking to compel arbitration and containing a judicial dispute resolution provision, and the party resisting arbitration had engaged in forum shopping to avoid arbitration. As a matter of policy, RLI should be the party estopped from seeking to compel arbitration, because it is the party that drafted and sold the AIA312 Performance Bond with the judicial dispute resolution provision and with full knowledge that the AIA101-1997 Construction Contract contained an arbitration provision limited to claims between the owner and the contractor. If RLI wanted to arbitrate claims with the obligee, RLI should not have inserted a judicial dispute resolution provision in the performance bond. The lower courts made no analysis and offered no explanation why equitable estoppel should be used to override a judicial dispute resolution provision in a standard-form contract whenever the drafter and seller of the contract prefers arbitration to litigation. (For a scholarly critique of the use of the doctrine of equitable estoppel to compel arbitration, see the dissent in *Grigson.*)

This case presents an opportunity to notify the lower courts that state-law contract principles must be applied faithfully under § 2 of the FAA.

2. *Conflict between Fifth Circuit and Eighth Circuit*

In *AgGrow Oils v. National Union Fire Ins. Co.*, 242 F.3d 777 (8th Cir. 2001), the Eighth Circuit reached the exact opposite result as the Fifth Circuit. The *AgGrow Oils* performance bond contained the exact same judicial dispute resolution provision as in the AIA312 performance bond:

> [a]ny proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located . . . within two years after the Surety refuses or fails to perform its obligations under this Bond.

Id. at 780. The *AgGrow Oils* performance bond also contained the exact same provision for incorporation for reference as the AIA312 performance bond, and the *AgGrow Oils* construction contract the exact same arbitration provision as the AIA101-1997 construction contract. The Eighth Circuit affirmed the district court's denial of the surety's motion to compel arbitration, finding that the performance bond did not incorporate the arbitration provision because: (1) an intent to arbitrate was not clearly expressed; and (2) any intent to arbitrate was negated: (i) by the bond provision referring to the judicial resolution of disputes; and (ii) by the provision in the construction contract that it "not be construed to create a contractual relationship of any kind . . . between any persons or entities other than the owner and the contractor." *Id.* at 781.

The Eighth circuit concluded:

> Mindful of the fundamental principle that "[a]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995), we are unwilling to construe an incorporation clause whose obvious purpose was to clarify the extent of the surety's secondary obligation as also reflecting a mutual intent to compel arbitration of all disputes between the surety and the obligee under the bond.

Id. at 782. Thus, interpreting identical contractual provisions, the Eighth Circuit held that the judicial dispute resolution provision in the performance bond precluded a motion to compel arbitration under the Federal Arbitration Act.

The *AgGrow Oils* district court relied on two additional grounds to reject the theory of incorporation by reference: (1) "In a suit on the performance bond, to the extent that the provisions of the bond and the construction contract conflict, the provisions specifically set forth in the bond control"; and (2) "the bond literally incorporates only [the owner's] promise to arbitrate with [the contractor]; it does not enlarge [the owner's] obligation to encompass mandatory arbitration with [the surety]." *AgGrow Oils v. National Union Fire Ins. Co.*, Case No. A3-99-26. (D.C.N.D. 1999).

The Court should resolve this conflict in the circuits in order to remove the uncertainty in the construction industry over the conflict between the judicial dispute resolution provisions and the arbitration provisions in the AIA standard-form construction documents.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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